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SUPREME COURT, U.S.

NO. 81-6174

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RAYMOND FRANKLIN,

Petitioner,

v.

WALTER ZANT, SUPERINTENDENT
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether the Supreme Court of Georgia properly determined that the trial court's charge on intent did not create a conclusive presumption prohibited by this Court's decision in Sandstrom v. Montana, 442 U.S. 510 (1978)?

II.

Whether the state habeas corpus court provided Petitioner equal protection and meaningful access to the courts by providing an alternative means for obtaining the testimony of witnesses?

III.

Whether the sentencing phase of Petitioner's trial properly complied with Georgia law and the requirements of the Eighth and Fourteenth Amendments?

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PART ONE

STATEMENT OF THE CASE

Petitioner was indicted in Cobb County, Georgia, during the January Term of 1979 for the kidnapping of Carol Heitmuller (Count I) and the murder of Claude Collie (Count II). Petitioner's motion for change of venue was granted and Petitioner's trial was held in Bibb County, Georgia, rather than in Cobb County, Georgia, where he had been indicted. Following a jury trial, Petitioner was found guilty on both counts, receiving the death penalty for Count II and a twenty year consecutive sentence for Count I.

Petitioner pursued his direct appeal to the Supreme Court of Georgia and that court affirmed his conviction in Franklin v. State, 245 Ga. 141 (1980). This Court subsequently denied a petition for a writ of certiorari from the decision of the Supreme Court of Georgia.

A petition for a writ of habeas corpus was filed on March 27, 1981 in the Superior Court of Butts County, Georgia. A hearing was held in this matter on May 25, 1981. Petitioner was represented by counsel at the time of the state habeas corpus hearing. Testifying on behalf of the Petitioner at the state habeas corpus hearing was Petitioner's mother, Ruby Franklin and a friend of the Petitioner, Jessie McGee. Petitioner also testified in his own behalf. Subpoenaed by the state were Petitioner's trial attorney, Barry Staples and the district attorney who prosecuted the Petitioner, Mr. Thomas Charron. Following the habeas corpus hearing, the state habeas corpus court denied Petitioner the relief sought on September 10, 1981. Following an application for a certificate of probable cause to appeal to the Supreme Court of Georgia, that court denied this

application on November 1, 1981. This petition for a writ of certiorari, requesting that this Court review the decision of the state habeas corpus court, followed. Further facts will be developed as is necessary for a more thorough illumination of any issue raised in this petition for a writ of certiorari.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE SUPREME COURT OF GEORGIA PROPERLY DETERMINED THAT PETITIONER'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE TRIAL COURT'S INSTRUCTIONS CONCERNING INTENT.

Petitioner challenges a portion of the trial court's charge on intent. Specifically, Petitioner challenges the following instructions:

> "The acts of a person of sound mind and discretion are presumed to be the product of the person's will . . . [A] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts."

(T. 656). Petitioner contends that this instruction affects the burden of going forward with the evidence concerning intent and also contends that a reasonable juror could have interpreted this presumption as "conclusive." The state habeas corpus court when considering this allegation, determined that it was decided adversely to the Petitioner on direct appeal to the Supreme Court of Georgia, and therefore, the court felt bound to hold that this contention was without merit. See Franklin v. State, 245 Ga. 152(8) (1980).

Of course, the allegation raised by Petitioner is essentially that the trial court's charge on intent was impermissibly burden-shifting under the principles set forth by this Court in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1978).

In Sandstrom v. Montana, supra, the defendant was charged with "deliberate homicide" in that he "purposefully or knowingly" caused the death of another. The defendant asserted that he had killed the victim; however, that he had not done so purposefully or knowingly. In Sandstrom, supra, the trial court charged the jury that, "the law presumes that a person intends the ordinary consequences of his voluntary acts."

Defense counsel objected to this instruction because it would shift the burden of proof on the issue of purpose or knowledge, in violation of the due process clause. The court overruled the objection and the charge was given. After the Montana Supreme Court affirmed the defendant's conviction, this Court granted the petition for a writ of certiorari to examine the instruction challenged by the defendant. This Court delineated the issue before it in the following language:

> "The question presented is, whether in a case in which intent is an element of the crime charged, the jury instruction 'the law presumes that a person intends the ordinary consequences of his voluntary acts' violated the Fourteenth Amendment's requirement that the state prove every element of a criminal offense beyond a reasonable doubt."

Sandstrom, supra, at 2453.

This Court held that the charge was unconstitutional because the jury might have interpreted the presumption as conclusive, or as shifting the burden of persuasion, either of which would have violated the requirement of the Fourteenth Amendment that the state prove every element of a criminal offense beyond a

reasonable doubt. Sandstrom, supra, at 2452. The court stressed that the jurors in that case were not informed ". . . that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory." Sandstrom, supra, at 2454.

The Respondent submits that the Supreme Court of Georgia was correct in holding that this case is clearly distinguishable from that before this Court in Sandstrom. The Petitioner has failed to quote the entire charge to the jury on intent which was given by the trial court during the guilt phase of the trial. Petitioner has emphasized that part of the charge that reads as follows:

> "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted."

(T. 656).

However, the Petitioner has neglected to emphasize that this charge was immediately followed by language of the court which reads as follows:

> "A person will not be presumed to act with criminal intention but the trier of fact, that is, the jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive

and all other circumstances connected with the act for which the accused is prosecuted."

(T. 656).

Therefore, one distinguishing factor between this charge and that before this Court in Sandstrom, is that the charge clearly stated that this was a rebuttable presumption. When considered in connection with the immediately following phrase that a person will not be presumed to act with criminal intention, this negates Petitioner's contention that a reasonable juror could have interpreted the charge as shifting the burden of persuasion to the Petitioner.

Another distinguishing factor is that in Sandstrom, supra, there was a specific objection made by defense counsel to the charge as given. In this case, there was no objection to the charge made by counsel for the Petitioner.

The Supreme Court of Georgia cited Cupp v. Naughten, 414 U.S. 141 (1973) for the proposition that the charge must be considered as a whole. Specifically, Cupp v. Naughten, supra, states that an instruction to the jury may not be judged in isolation, but must be viewed in the context of the charge as a whole. The Supreme Court of Georgia found that, "considering the charge as a whole, we find reasonable jurors would not have interpreted the presumptions as being conclusive or as shifting the burden of persuasion to the defendant." Franklin v. State, 245 Ga. 141, 154 (1980).

Respondent submits that the trial court's instructions clearly created only a "permissive inference" similar to the charge considered by this Court in County Court of Ulster County, New York v. Allen, 442 U.S. 140 (1979).

Additionally, in Skrine v. State, 244 Ga. 520, 260 S.E.2d 900 (1979), the Supreme Court of Georgia considered similar instructions in light of Sandstrom, supra. The Skrine court found the charge acceptable because there was no mandatory presumption, but a permissive inference which the jury could logically and properly draw.

As this charge merely created the permissive inference permissible under constitutional principles and as it was not objected to by the Petitioner, this contention presents nothing for review by this Court.

II. GA. CODE ANN. § 38-801(d) DID NOT OPERATE TO DENY PETITIONER'S RIGHTS OF EQUAL PROTECTION OR OF MEANINGFUL ACCESS TO THE COURT, AS IN THIS CASE ALTERNATIVE MEANS WERE PROVIDED TO OBTAIN THE TESTIMONY OF WITNESSES, CERTAIN WITNESSES APPEARED VOLUNTARILY, AND CERTAIN WITNESSES WERE SUBPOENAED AND PAID FOR BY THE STATE.

Ga. Code Ann. § 38-801(d), requires that when a witness resides outside the county where testimony is to be given, service of a subpoena, to be valid, must be accompanied by the tender of witness and mileage fees. Ga. Laws, 1980, pp. 70-71 amended the mileage and witness fees by raising the witness fees from $4.00 per diem to $10.00 per diem and the mileage fees from .08 per mile, to .20 per mile, to be tendered in order to validate any subpoenaes which might be issued.

Petitioner contends that this code section denied Petitioner, an indigent death row inmate, equal protection and meaningful access to the court in his state habeas corpus proceedings. Respondent submits that under the circumstances of this case, none of Petitioner's constitutional rights were violated by the operation of this statute.

Prior to Petitioner's state habeas corpus hearing, Petitioner made a motion for counsel and payment by state of investigative and litigation expenses. A copy of this motion and its attendant memorandum of law is attached as Respondent's Exhibit "A". Additionally, Petitioner filed a motion to tape record depositions

pursuant to Ga. Code Ann. § 81A-130(b)(4), which authorizes the court to allow testimony at a deposition to be recorded by other than stenographic means. A copy of this motion is attached as Respondent's Exhibit "B". Although the court denied the expenses for counsel or for investigation under the law, the court did grant Petitioner's motion to tape record depositions. A copy of this order is attached as Respondent's Exhibit "C". The order stated, in part, the following:

> "The Court observes that all death row inmates are indigent. Because they are not entitled to appointment of counsel or funds for expenses in habeas proceedings, Harris v. Hopper, 243 Ga. 244(6)(1979), Pulliam v. Balkcom, 245 Ga. 99 (1980), the Court thinks that not only is the granting of such motion authorized, but is demanded under the Fifth and Fourteenth Amendments of the United States Constitution and corresponding provisions of the Georgia constitution to afford indigents under sentence of death the opportunity to use other than stenographic means either for discovery or presentation of evidence at trial.
>
> Accordingly, it is Ordered that Petitioner be permitted to tape record depositions, subject to the following requirements for admissibility as promulgated in

Steve M. Solomon, Jr., Inc. v. Edgar,

92 Ga. App. 207(3)(1955). . ."

Therefore, Petitioner was provided with a means of securing the testimony of witnesses, even assuming for the sake of argument, that he had no funds to secure their testimony pursuant to the above-cited code section. It should be noted that in fact the Petitioner did make use of the alternative means of securing the testimony of witnesses, by taking the tape recorded deposition following the habeas corpus hearing, of Mr. Birney Knight.

Additionally, Petitioner merely made general allegations as to those witnesses which he needed to present his case. He stated only that he needed to subpoena witnesses and hire experts to testify concerning matters in issue. (See Respondent's Exhibit " A").

It should also be noted that at Petitioner's hearing he was able to present the testimony of certain witnesses who apparently voluntarily came to the hearing, including Petitioner's mother, Mrs. Ruby Franklin, and a family friend, Jessie McGee. Additionally, the state subpoenaed and had present for the cross-examination of the Petitioner at the hearing, the Petitioner's trial attorney, Mr. Barry Staples. Petitioner had raised the question of ineffective assistance of counsel and was able to question Mr. Staples with regard to that and other issues. Also present pursuant to the request of the state was Mr. Thomas Charron, the district attorney who tried the Petitioner and he was available for cross-examination of the Petitioner on any of the issues raised by means of the state habeas corpus proceeding.

Wherefore, on the basis of all the above and foregoing facts and circumstances, it can readily be seen that this code section did not in this case operate to deny Petitioner his right to equal protection nor deny him meaningful access to the courts, as he was provided with alternative means to secure the testimony of any vital witnesses and also was able to obtain certain witnesses who came to the habeas corpus hearing voluntarily.

This contention presents nothing for the review of this Court.

III. THE SENTENCING PHASE OF PETITIONER'S TRIAL WAS PROPERLY CONDUCTED UNDER GEORGIA LAW AND COMPLIED WITH APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner contends that his rights under the Eighth and Fourteenth Amendments were violated because the trial court allowed the introduction of evidence during the sentencing phase of Petitioner's trial. He further contends that his constitutional rights were violated because he contends that relevant mitigating factors were not permitted to be admitted during the sentencing phase of his trial. These issues were raised in Petitioner's state habeas corpus petition, but had already been decided by the Supreme Court of Georgia in Petitioner's direct appeal to that court. Therefore, the state habeas corpus court bound itself to the opinion already rendered by the Supreme Court of Georgia.

As already noted, a petition for a writ of certiorari from the judgment of the Supreme Court of Georgia has already been denied by this Court.

First, it should be noted that proper notice under Georgia law was given concerning the intended introduction of the evidence of prior convictions at the sentencing phase of Petitioner's trial. Ga. Code Ann. § 27-2503 requires that notice of prior convictions to be utilized by the state in the sentencing phase must be provided "prior to his trial." The Supreme Court of Georgia found that, in fact, timely notice was given prior to Appellant's trial. Franklin v. State, 245 Ga. 141, 149 (1980). The Supreme Court of Georgia noted its previous decision in Herring v. State, 328 Ga. 288, 290 (1977), in which it was stated:

"The purpose of Code Annotated Section 27-2503(a) is to allow a defendant to examine his record to determine if the convictions are in fact his, if he was represented by counsel, and any other defect which would render such documents inadmissible during the presentencing phase of the trial."

Id. at 149.

The Supreme Court of Georgia went on to note that Petitioner had never contended that these convictions which were introduced were not his or that he was not represented by counsel at the time of these convictions or that these convictions were inadmissible for further reasons other than the alleged violation of the notice requirement.

The Supreme Court of Georgia properly determined that Georgia law had been complied with and that Appellant had failed to show that these convictions were improperly admitted, much less, that he was harmed by their admission.

With reference to the alleged improper limitation of mitigating circumstances during the sentencing phase, this too was rejected by the Supreme Court of Georgia in Petitioner's direct appeal to that court. During the sentencing phase of the trial, Petitioner sought to introduce the testimony of Mr. E. L. Smith to testify concerning the ritual of execution and what he believed to be the effect of life on death row upon inmates. The Petitioner also wanted Mr. Smith to testify concerning execution statistics in the State of Georgia. The Petitioner sought to introduce the testimony of another person who had observed 189 executions and

wanted to offer the testimony of that person concerning the "ritual of execution." The third witness which the Petitioner wished to have testify was Dr. Robert Otto, concerning religious objections to the death penalty.

During the sentencing hearing the Petitioner made the same argument to the trial court which he made to the Supreme Court of Georgia. Essentially, this argument is that under Gregg v. Georgia, 428 U.S. 153 (1976), the jury should have as much information before it as possible. The trial court expressed some reservation about allowing this type of testimony, based on the different context in which questions concerning the evidence to be presented at the sentencing phase arose in Gregg v. Georgia, supra. However, the trial court listened to the testimony of each of the witnesses previously cited, outside the presence of the jury, in order to satisfy himself as to the content of the wintesses' testimony should they be allowed to testify. (T. 713-747). Following the testimony of these witnesses, the trial court adhered to its former ruling excluding this testimony from the jury's consideration, by stating that this testimony addressed itself primarily to the constitutionality of the death penalty itself and not to this specific case.

The Supreme Court of Georgia in rejecting this allegation by the Petitioner noted that in Gregg v. Georgia, this Court discussed the sentencing procedures as outlined in the Georgia death penalty statute. This Court discussed in detail the fact that jurors under the Georgia death penalty statute are able to consider both aggravating and mitigating circumstances. This Court noted in discussing these procedures that:

> "These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence . . . . . [T]he jury's attention is directed to the specific circumstances of the crime: was it committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way or in a manner that endangered the lives of many persons? In addition, the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth, the extent of his cooperation with the police, his emotional state at the time of the crime)."

Id. at 197.

The above-cited portion of Gregg v. Georgia, supra, was cited by the Supreme Court of Georgia in Franklin v. State, 245 Ga. 141, 151 (1980).

The Supreme Court of Georgia went on to discuss this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978). The court noted the language of this Court in Lockett v. Ohio, supra, which stated that the requirements of the Eighth and Fourteenth Amendments are that: ". . . the sentencer, in all but the rarest kind of

capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." The Supreme Court of Georgia also noted this Court's footnote 12 in Lockett v. Ohio, which states, "nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Franklin v. State, 245 Ga. 141, 152 (1980).

The Supreme Court of Georgia correctly concluded that the testimony of these three witnesses in no way related to the defendant's character, his prior record or the circumstances of his offense. They also correctly noted in footnote that if this type of testimony related generally to the issue of the constitutionality of the death penalty were admissible as "mitigating evidence," the state could presumably introduce general evidence supporting the imposition of the death penalty. Franklin v. State, 245 Ga. at 152, fn. 9.

The Petitioner cites this Court's recent decision in Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869 (1982), as the basis for allowing the testimony of these persons into evidence. Of course, in Eddings v. Oklahoma, supra, the trial court refused, as a matter of law, to consider in mitigation the circumstances of Petitioner's unhappy upbringing and emotional disturbance. This type of evidence was, of course, exactly what was considered as mitigating under Lockett v. Ohio, supra, as relating directly to the individual defendant, not to the death penalty in general.

Petitioner now raises for the first time the failure of the trial court to allow a psychologist to testify as to his opinion of the Petitioner's character as to rehabilitation. As far as

counsel for the Respondent is aware, this is the first time Petitioner has contended that this testimony should have been allowed into evidence in mitigation, as it was not raised on direct appeal to the Supreme Court of Georgia, nor to the knowledge of the counsel for the Respondent, in Petitioner's state habeas corpus action.

Although Petitioner states that the trial court would not allow a "psychologist" to testify as to his opinion of the Petitioner's character as to rehabilitation, citing his appendix "F", this appendix does not bear this out. Mr. E. L. Smith, an educator, (appendix "F", p. 713), who had taken some psychology courses, (appendix "F", p. 714), testified outside the presence of the jury that he had read the psychological profile of the Petitioner prepared by psychologists at the jail in Marietta, Georgia. The purpose of his testifying concerning his having read this profile was that he was then asked numerous questions on whether or not Petitioner fit in with the criminal psychological profile. (T. 717). On cross-examination by the district attorney, Mr. Smith admitted that the "criminality profile" was not even his concept. Further, and more significantly, Mr. Smith admitted that he had simply read the psychological profile concerning the Petitioner but he had conducted no examination and had only met the Petitioner for the first time 24 hours prior to his testimony. (T. 727). Obviously, Mr. Smith, who was not a psychologist, was not qualified on the basis of any of the evidence presented for the trial court's review to testify about Petitioner's character, as he didn't know the Petitioner nor about his ability to be rehabilitated based on his "psychological profile," which was simply read by Mr. Smith who was not qualified to make an evaluation of that profile. Clearly, this evidence was not admissible and it is doubtful whether it was even arguably mitigating

in light of the cross-examination of the district attorney. Again, it should be emphasized that the Georgia courts have not been given an opportunity to review this particular allegation made by the Petitioner.

Respondent contends that the sentencing phase of Petitioner's trial was conducted in accordance with Georgia law and the dictates of the Eighth and Fourteenth Amendments and that his contention presents nothing for this Court's review.

CONCLUSION

For all the above and foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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AFFIDAVIT OF TIMELY FILING

PURSUANT TO RULE 28(2)

I, Susan V. Boleyn, a member of the Bar of this Court and counsel of record in Case No. 81-6174, Raymond Franklin v. Walter Zant, Superintendent, hereby certify in accordance with Rule 28(2) of the Rules of this Court that on March 26, 1982, there was deposited in the United States Post Office, Capitol Hill Annex, with sufficient postage prepaid, Respondent's brief in opposition addressed to Honorable Alexander Stevas, Clerk, Supreme Court of the United States.

Both the response filed with this Court and the service copy to counsel for Petitioner were mailed within the permitted time.

This 26th day of March, 1982.

Susan V. Boleyn
SUSAN V. BOLEYN

Sworn to and subscribed to
before me this 26th day of
March, 1982.

Barbara Hughes
NOTARY PUBLIC

My Commission Expires:

Notary Public, Georgia State at Large
My Commission Expires Nov. 16, 1984

SVB
D

IN THE SUPERIOR COURT FOR THE COUNTY OF BUTTS

STATE OF GEORGIA

RAYMOND FRANKLIN,	*	
Petitioner	*	HABEAS CORPUS NO. 5025
VS.	*	
WALTER D. ZANT, Superintendent, Georgia Diagnostic and Classification Center,	*	
Respondent	*	

MOTION FOR COUNSEL AND PAYMENT BY STATE OF INVESTIGATIVE AND LITIGATION EXPENSES

Petitioner moves the Court for counsel appointed by the Court and paid by the State, and for payment of investigative and litigation expenses, and shows that:

1.

Petitioner is an indigent who cannot afford payment of investigative and litigation expenses necessary to diligently pursue his petition for Writ of Habeas Corpus.

2.

Present counsel did not enter the case until after Petitioner's death sentence was affirmed by the Georgia Supreme Court and certiorari denied in the United States Supreme Court.

3.

Through present counsel, Petitioner has raised numerous substantive errors in his petition for Writ of Habeas Corpus which were not previously raised by his former attorneys, including whether the Trial Judge's charge was improper.

4.

In order to fully and fairly present his case to the court, Petitioner needs to subpoena witnesses and hire experts to testify concerning matters

in issue, but is unable todb so because he is an indigent who has been incarcerated for more than two (2) years.

5.

Petitioner requires funds to advance his state Habeas Corpus claim as follows:

(a) To pay for legal counsel.

(b) To pay an investigator to conduct investigations in regard to:

(1) Petitioner's Habeas Corpus claim that the Supreme Court of Georgia is not properly reviewing cases in which the death penalty is imposed.

(2) Petitioner's Habeas Corpus claim that his death sentence is being enacted pursuant to a practice by Georgia prosecuting authorities, courts, juries and Governors to discriminate on grounds of sex and poverty in the administration of capital punishment.

(3) Petitioner's Habeas Corpus claim challenging the composition of the grand and traverse juries of Bibb County. The jury statistics for the last 6-10 years must be fully compiled to properly present the challenge.

(c) To pay subpoena and mileage costs of witnesses;

(d) To pay for expert witnesses needed to testify concerning Petitioner's challenges to the Georgia death penalty statute.

WHEREFORE, Petitioner prays that the Court:

(a) Appoint counsel to be paid by the State;

(b) Authorize payment by the State of investigative, witness-lay and expert and litigation expenses reasonably necessary for Petitioner's Habeas Corpus case to be fully and fairly heard.

/s/ Ronnie K. Batchelor
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IN THE SUPERIOR COURT FOR THE COUNTY OF BUTTS

STATE OF GEORGIA

RAYMOND FRANKLIN,	*	
	*	
Petitioner	*	HABEAS CORPUS NO. 5025
	*	
VS.	*	
	*	
WALTER D. ZANT, Superintendent Georgia Diagnostic and Classification Center,	*	
	*	
Respondent	*	

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION FOR COUNSEL AND PAYMENT BY STATE OF INVESTIGATIVE AND LITIGATION EXPENSES

In an effort to establish factually the claims alleged in his Habeas Corpus petition, petitioner has moved the Court to authorize payment for legal counsel, an investigator, subpoena and mileage costs of witnesses and expert witnesses. Motion, at 1. A number of legal precedents support this request in the circumstances of this case.

There is a Federal constitutional requirement that state post-conviction procedures be fundamentally fair and adequate for the full adjudication of Federal constitutional claims. "It is the solemn duty of ... [state] courts, no less than Federal ones, to safeguard personal liberties and consider Federal claims in accord with Federal law." Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (concurring opinion of Mr. Justice Powell).[1] See, e.g. McNeil v. Culver, 365 U. S. 109, 117 (1961); Wilde v. Wyoming, 362 U.S. 607 (1960); Sublett v. Adams, 362 U. S. 143 (1960).

The ability of a prisoner to establish his Federal constitutional claims in a state post-conviction proceeding will normally depend on the evidence he can muster and this, in turn, may depend on his economic status. While the State is under no obligation to equalize exactly the opportunities of indigent and non-indigent prisoners to obtain collateral relief from

1. See, Case v. Nebraska, 381 U.S. 336, 344-345 (1965) (Concurring opinion of Mr. Justice Brennan) (Footnote omitted).

criminal convictions, a number of precedents during the last twenty years establish that the Equal Protection and Due Process Clauses of the Fourteenth Amendment do not allow a State's criminal justice system to deprive indigent defendants of basic procedural rights to obtain redress from illegal or unconstitutional convictions simply because of their indigence. The State must furnish indigent defendants with "the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." Britt vs. North Carolina, 404 U. S. 226, 227 (1971).

The fundamental fact that courts have recognized is that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Griffin v. Illinois, 351 U. S. 12, 19 (1056). See, Coppedge v. United States, 369 U. S. 438, 446-447 (1962). For "differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnent to the Constitution." Roberts v. LaVallee, 389 U.S. 40, 42 (1967). Thus, counsel must be appointed to represent indigent defendants at felony trials, Gideon v. Wainwright, 372 U. S. 335 (1963); Powell v. Alabama 287 U. S. 45 (1931), and misdemeanor trials, Argersigner v. Hamlin, 407 U. S. 25 (1972), and on appeal, Douglas v. California, 372 U. S. 353 (1963). A transcript for appeal may not be denied to a convicted defendant simply because of his indigence, Griffin v. Illinois, supra; Draper v. Washington, 372 U. S. 487 (1963); Williams v. City of Oklahoma City, 395 U. S. 458; Mayer v. City of Chicago, 404 U. S. 189 (1971); see also Rinaldi v. Yeager, 384 U. S. 305 (1966). An indigent defendant may not be forced to pay a filing fee as a prerequisite for an appeal, Burns v. Ohio, 360 U. S. 252 (1959); Douglas v. Green, 363 U. S. 192 (1960). A convicted defendant may not be imprisoned simply because he is unable to pay a fine, Williams v. Illinois, 360 U. S. 252 (1959; Tate v. Short, 399 U. S. 235 (1970). See also Boddie v. Connecticut, 401 U. S. 371, 375-377, 382-383 (1971). Cf. Britt v. North Carolina, supra.

The principle that the State cannot deny fundamental procedural rights in the criminal justice system simply because of economic status is not, however, limited to trials and direct appeals: "for the indigent as well as for the affluent prisoner, post-conviction proceedings must be more than formality.: Johnson v. Avery, 393 U. S. 483, 386 (1969(. In Johnson, the Supreme Court of the United States invalidated the State of Tennessee's prison regulation prohibiting its inmates from assisting one another in the

filing of State or Federal post-conviction writs. The Court held that the impact of the State's regulation was to unconstitutionally "forbi[d] illiterate or poorly educated prisoners to file Habeas Corpus petitions." 393 U. S. 487, Subsequently, in Bounds v. Smith, _____ U.S. _____, 97 S. Ct. 1491, 1498 (1977), the Court held that states were constitutionally obligated "to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." In reliance upon Bounds v. Smith, supra, a recent Federal district court opinion held that an indigent Habeas Corpus petitioner was entitled to appointed counsel and payment by the state of investigative, witness and litigation expenses to insure a full and fair hearing. Gibson v. Jackson, ___ F. Supp. _____ (M.D. Ga., December 20, 1977). Court decisions make clear that access to state post-conviction procedures may not be limited by economic barriers which have no rational relationship to the merits of the legal claims sought to be raised. See Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U. S. 214 (1958); Ross v. Schneckloth, 347 U. S. 575 (1958); McCrary v. Indiana, 364 U. S. 277 (1960); Smith v. Bennett, 365 U. S. 708 (1961); Lane v. Brown, 372 U. S. 477 (1963); Long v. District Court of Iowa, 385 U. S. 192 (1966); Gardner v. California, 393 U. S. 367 (1969). Discrimination "based on indigency alone," Lane v. Brown, supra, 372 U. S. at 485, is impermissible.

In the present case, while the State of Georgia has not denied petitioner formal access to its post-conviction remedies, by denying him funds for investigators (legal resources available to more affluent defendants), it has rendered these proceedings a "meaningless ritual," Douglas v. California, supra, 372 U. S. at 358. And this has occurred in a case where the highest standard of regularity and fairness is required, for at stake is petitioner's very life, since the State has exacted the "unique and irreversible penalty of death," Woodson v. North Carolina, 428 U. S. 280, 287 (1976) (plurality opinion) (footnote omitted). In death cases, courts must be "particularly sensitive to see that every safeguard is observed," Gregg v. Georgia, 428 U.S.

153, 187 (1976) (plurality opinion). For it "cannot fairly be denied ... that death is a punishment different from all other sanctions in kind rather than degree .... Because of that qualitative difference, there is a corresponding difference in the need for reliability that death is the appropriate punishment in a specific case." Woodson v. North Carolina, supra, 428 U. S. at 303-305 (plurality opinion) (footnote omitted.).[1]

The decision in Gregg v. Georgia, 428 U. S. 153 (1976), that the Georgia capital punishment statute is constitutional on its face, does not foreclose the possibility of petitioner's prevailing on his Habeas petition, because it is a truism that a constitutional statute may be unconstitutionally applied, see, e.g., Yick Wo v. Hopkins, 118 U. S. 356, 373 (1886), and one of petitioner's contentions is that as applied the death penalty is in fact orbitrary, capricious, and discriminatory.

Petitioner's constitutional contentions present a classic instance in which the "salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable." Polk v. Grove, 305 U. S. 5, 10 (1938).[2] That principle applies "if there is a reasonable likelihood that the production of evidence will make the answer to the [constitutional] questions clearer." Borden's Farm Products Co. v. Baldwin, 293 U. S. 194, 213 (1934) (concurring opinion of Justice Stone and Justice Cardozo). Expert testimony and empirical data have played a significant part in the development of constitutional law, see, e.g., Brown v. Board of Education, 347 U. S. 483, 484 n. 11 (1954); Alabama State Federation of Labor v. McAdory, 325 U. S. 450, 460-61 (1945); San Antonio Independent School District v. Rodriquez, 411 U. S. 1, 23-25 (1973), and would illuminate the

1. In Gardner v. Florida, ___ U. S. ___, 97 S. Ct. 1197, 1204 (1977), the Court noted that: "Five members of the Court have now expressly recognized that death is a different kind of punishment than any other which may be imposed in this country.... From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action."

2. "Judges make constitutional law as they make other kinds of law, on the basis of facts proved and assumed. They are likely to do a better job when their assumptions rest on information rather than hunch." Karst, Legislative Facts in Constitutional Litigation, in KURLAND (ed.) THE SUPREME COURT REVIEW, 1960 at 75. See also, Bikel, Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action, 38 HARV. L. REV. 6 (1942).

constitutional claims petitioner is raising in this case. Adjudication of "important constitutional question[s] on the pleadings is not favored, " Wilshire Oil Co. v. United States, 295 U. S. 100, 102 (1935), the appropriate procedure being "determination by the ... [trial] court of the facts of the case to which the challenged statute is sought to be applied," id. at 102-103. See also, Morton Salt Co. v. City of South Hutchinson, 159 F. 2d 897, 902 (CA10 1947); Cone v. Rorick, 112 F. 2d 894, 897 (CA4 1940).

The precise relief to be granted pursuant to petitioner's Motion rests within the discretion of the Court. The parties might be instructed to submit plans for the study of a representative sample of Georgia capital cases arising under the 1973 Capital Punishment Statute. The Court might order the parties to submit the names of social scientists who would submit plans for such a study. Or the Court might appoint a special auditor to make findings of fact, since Georgia law provides for the appointment of auditors "in equitable proceedings if the case shall require it," Ga Code Ann §10-101. The auditor is authorized to pass upon "questions of ... fact" arising from the contentions of the parties, and he is empowered to "subpoena and swear witnesses and compel the production of papers." Ga Code Ann §10-103. He may also hold evidentiary hearings, Ga Code Ann § 10-104, and prepare reports, Ga Code Ann §10-201, containing findings of fact, Ga Code Ann §1-203.

While petitioner's motion necessitates the expenditure of State funds, the rights of an indigent defendant are not subject to a balancing test when his life is at stake. In Mayer v. City of Chicago, 404 U. S. 189 (1971), for example, the City argued that it should not have to provide transcripts for an appeal of right to indigent prisoners sentenced to pay a fine. The Court flatly rejected this contention:

> The city suggest that ... [an indigent defendant's] interest in a transcript is out-weighed by the State's fiscal and other interest in not burdening the appellate process. This argument misconceived the principle of Griffin ... Griffin does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not

> erased by any differences in the sentences that may be imposed. The State's fiscal interest is, therefore, irrelevant.

404 U. S. at 196-97. The Georgia State Bar Association has recognized that "[a] lawyer is often no better than the investigation facilities of expert witnesses as his command.[1] Since "[t]he magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society," Marion V. Beto, 434 F. 2e 29, 32 (5th Cir. 1970), it should be adequate to insure that this indigent, death-sentenced inmate has a realistic opportunity to present in his state habeas corpus proceeding the Federal constitutional contentions which may save his life.

Respectfully submitted,

RONNIE K. BATCHELOR,
Attorney for Petitioner

4179 Memorial Drive
Decatur, Georgia 30032
404/296-1500

1. Committee of the State Bar of Georgia on Compensated Counsel, Assistance to the Indigent Person Charged with Crime, 2 GA.B.J. 197, 202 (1965).

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the copies of the within and foregoing on the respondent in this action by placing true and correct copies thereof in the United States Mail, first class postage prepaid, addressed to respondent as follows:

Mr. Walter D. Zant
Superintendent
Gerogia Diagnostic & Classification Center
P. O. Box 3877
Jackson, Georgia 30233

and on the Attorney General by placing a true and correct copy thereof in the United States Mail, first class postage prepaid, addressed as follows:

Hon. Arthur K. Bolton
Room 132
Judicial Building
Capitol Square
Atlanta, Georgia 30334

This 19th day of May, 1981.

/s/ Ronnie K. Batchelor
RONNIE K. BATCHELOR,
Attorney for Petitioner

IN THE SUPERIOR COURT FOR THE COUNTY OF BUTTS

STATE OF GEORGIA

RAYMOND FRANKLIN,	*	HABEAS CORPUS NO. 502S
	*	
Petitioner	*	
	*	
VS.	*	
	*	
WALTER D. ZANT, Superintendent, Georgia Diagnostic and Classification Center,	*	
	*	
Respondent	*	

MOTION TO TAPE RECORD DEPOSITIONS

Now comes the petitioner in the above-styled case, through his undersigned counsel and moves this Court order that he be allowed to tape record the depositions to be taken by the petitioner in this case.

As grounds for this motion, petitioner shows:

1.

Ga Code Ann §81A-130(b) (4) authorizes the Court to allow testimony at a deposition to be recorded by other than stenographic means.

2.

Petitioner is completely without and cannot obtain the money with which to pay a stenographer to record the depositions.

3.

The depositions will be taken under oath before a person authorized by law to administer oaths.

4.

The depositions will be recorded by an electronic recording device of sufficient quality to insure the accurate recording of the entire deposition.

Respectfully submitted,

s/ Ronnie K. Batchelor

RONNIE K. BATCHELOR,
Attorney for Petitioner

4179 Memorial Drive
Decatur, Georgia 30032
404/296-1500

RESPONDENT'S EXHIBIT "B"

IN THE SUPERIOR COURT FOR THE COUNTY OF BUTTS

STATE OF GEORGIA

RAYMOND FRANKLIN,	*	HABEAS CORPUS NO. 5025
Petitioner	*	
VS.	*	
WALTER D. ZANT, Superintendent, Georgia Diagnostic and Classification Center,	*	
Respondent	*	

MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION TO TAPE RECORD DEPOSITIONS

This Court may order that the testimony at a deposition be recorded by other than stenographic means, Ga Code Ann §81A-30(b) (4).

The purpose of Section 30(b) (4) of the Civil Practice Act, like that of the identical Federal rule, is to facilitate effective participation of the economically disadvantaged in the courts through the lowering of costs as a result of the use of modern technology. Lucas v. Curan, 62 F.R.D. 336 (D.C. Pa. 1974). The petitioner to this case, RAYMOND FRANKLIN, is a pauper currently incarcerated by the State of Georgia; he is completely without the money necessary to hire a stenographer to record depositions. Tape recording of these depositions is essential to facilitate RAYMOND FRANKLIN'S effective presentation of issues to this Court and to enable RAYMOND FRANKLIN to be assisted effectively by counsel.

Respectfully submitted,

/s/ Ronnie K. Batchelor

RONNIE K. BATCHELOR,
Attorney for Petitioner

4179 Memorial Drive
Decatur, Georgia 30032
404/296-1500

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the copies of the within and foregoing on the respondent in this action by placing true and correct copies thereof in the United States Mail, first class postage prepaid, addressed to respondent as follows:

Mr. Walter D. Zant
Superintendent
Georgia Diagnostic & Classification Center
P. O. Box 3877
Jackson, Georgia 30233

and on the Attorney General by placing a true and correct copy thereof in the United States Mail, first class postage prepaid, addressed as follows:

Hon. Arthur K. Bolton
Room 132
Judicial Building
Capitol Square
Atlanta, Georgia 30334

This 19th day of May, 1981.

S/ Ronnie K. Batchelor
RONNIE K. BATCHELOR,
Attorney for Petitioner

4179 Memorial Drive
Decatur, Georgia 30032
404/296-1500

IN THE SUPERIOR COURT FOR THE COUNTY OF BUTTS

STATE OF GEORGIA

RAYMOND FRANKLIN,	*	HABEAS CORPUS NO. 5025
	*	
Petitioner	*	
	*	
VS.	*	
	*	
WALTER D. ZANT, Superintendent Georgia Diagnostic and Classification Center,	*	
	*	
Respondent	*	

MOTION FOR COMPENSATION OF COUNSEL

Comes now the Petitioner in the above-styled case, RAYMOND FRANKLIN, and moves this Honorable Court to compensate his counsel of record, RONNIE K. BATCHELOR, from state funds for his representation in these proceedings and in support thereof shows as follows:

1.

Petitioner is currently being detained at the Georgia Diagnostic and Classification Center at Jackson, Georgia, under a sentence of death pursuant to a conviction in the Superior Court of Bibb County, on April 26, 1979.

2.

Petitioner is indigent.

3.

Petitioner shows that at the evidentiary hearing to be held on May 26, 1981 in the Superior Court of Butts County, Georgia, State of Georgia, the State will be represented by counsel who is compensated by the State in order to seek an affirmance of the death sentence imposed upon Petitioner.

4.

Petitioner further shows that at the evidentiary hearing on May 26, 1981, evidence will be presented which will show, et. al., that Petitioner was denied his right to effective assistance of counsel and that other constitutional problems exist concerning Petitioner's conviction and death sentence.

5.

These issues were not raised at trial or on direct appeal.

6.

Petitioner further shows that if counsel did not represent him, he

would not be able to avail himself of the writ of habeas corpus to reveal the serious defect, in his conviction and would be strapped into the electric chair with electrodes attached to his body and electrocuted until he was dead based upon a conviction in which Petitioner was denied his right to be represented by effective counsel at his trial and sentencing as guaranteed by the Fifth, Sixth, due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and Sections 2-101, 2-109, and 2-111 of the Constitution of 1976 of the State of Georgia.

7.

Petitioner further shows that in light of the circumstances and facts of his case, that a grave injustice would result to Petitioner unless he were represented by counsel.

8.

Georgia laws do not currently allow for the compensation of counsel to represent indigent defendants on habeas corpus.

9.

Petitioner further alleges that this process denies Petitioner equal protection as guaranteed by the United States and Georgia Constitutions and further invites and promotes the possibility of innocent men or women being electrocuted until dead without having counsel appointed to investigate and discover errors, which may prove defendant's innocence.

WHEREFORE, Petitioner prays:

(a) That a evidentiary hearing be held regarding the propriety and amount of compensation for counsel;

(b) That the State be directed to compensate adequately Petitioner's counsel for this habeas corpus petition;

(c) For such other relief as the Court deems just and proper in light of the circumstances.

Respectfully submitted,

s/ Ronnie K. Batchelor

RONNIE K. BATCHELOR,
Attorney for Petitioner

4179 Memorial Drive
Decatur, Georgia 30032
404/296-1500

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the copies of the within and foregoing on the respondent in this action by placing true and correct copies thereof in the United States Mail, First Class postage prepaid, addressed to respondent as follows:

Mr. Walter D. Zant
Superintendent
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and on the Attorney General by placing a true and correct copy thereof in the United States Mail, First Class postage prepaid, addressed as follows:

Hon. Arthur K. Bolton
Room 132
Judicial Building
Capitol Square
Atlanta, Georgia 30334

This 19th day of May, 1981.

s/ Ronnie K. Batchelor
RONNIE K. BATCHELOR,
Attorney for Petitioner

4179 Memorial Drive
Decatur, Georgia 30032
404/296-1500

SB 3

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

RAYMOND FRANKLIN,	:	
	:	
PETITIONER	:	
	:	HABEAS CORPUS
VS.	:	CASE NO. 5025
	:	
WALTER ZANT,	:	
SUPERINTENDENT	:	
GEORGIA DIAGNOSTIC AND	:	
CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

O R D E R

Upon consideration of Petitioner's Motion to Tape Record Depositions, the Court utilizes its discretion under Ga. Code Ann. §81A-130(b)(4) to grant the Motion in this death penalty habeas proceeding because of Petitioner's indigency.

The Court observes that all Death Row inmates are indigent. Because they are not entitled to appointment of counsel or funds for expenses in habeas proceedings, Harris v. Hopper, 243 Ga. 244(6) (1979), Pulliam v. Balkcom, 245 Ga. 99 (1980), the Court thinks that not only is the granting of such motion authorized, but is demanded under the Fifth and Fourteenth Amendments of the United States Constitution and corresponding provisions of the Georgia Constitution to afford indigents under

RESPONDENT'S EXHIBIT "C"

sentence of death the opportunity to use other than stenographic means either for discovery or presentation of evidence at trial.

Accordingly, it is Ordered that Petitioner be permitted to tape record depositions, subject to the following requirements for admissibility as promulgated in Steve M. Solomon, Jr., Inc. v. Edgar, 92 Ga. App. 207(3)(1955):

(1) It must be shown that the mechanical transcription devise was capable of taking testimony.[1]

(2) It must be shown that the operator of the device was competent to operate it.

(3) The authenticity and correctness of the recording must be established.

(4) It must be shown that changes, additions, or deletions have not been made.

(5) The manner of preservation of the record must be shown.

(6) Speakers must be identified.

(7) It must be shown that the testimony elicited was freely and voluntarily made, without any kind of durress.

Additionally, the taping of the depositions shall be subject to the general provisions regarding notice and other applicable provisions of the Georgia Civil Practice Act.

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[1] The Court recommends the use of cassette tapes due to their inherent safeguards.

After the deposition, the attorneys shall certify the correctness and completeness of the recordings in the same manner as would a stenographic reporter in certifying an oral deposition. The attorneys shall then appropriately label, seal, and file the tape recordings with the Office of the Clerk of this Court.

Upon a showing of compliance with the foregoing requirements, the tape recordings may be played and presented as evidence at the hearing. Objections which might be raised during the deposition shall be reserved until that time.

SO ORDERED, this 1 day of June, 1981.

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT